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No. 91-1561

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. HUGHES, et al.,

Cross-Petitioners,

vs.

CONSOL PENNSYLVANIA COAL COMPANY, et al.,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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April 7, 1992

QUESTIONS PRESENTED

1. Whether the grant to cross-respondents of judgment n.o.v. on cross-petitioners' claims of RICO fraud, affirmed by the Third Circuit, was correct in the circumstance that there was not any evidence from which the jury could have found that purchases by cross-respondents of cross-petitioners' lands over a ten-month period in order to assemble a single railroad right-of-way constituted a "pattern" of racketeering activity?

2. Whether cross-petitioners may now raise, for the first time, the question whether the sale of their lands to a railroad pursuant to negotiated contracts of sale constituted a "taking" of cross-petitioners' property for which "just compensation" (U.S. Const. amend. V), by way of accrued interest ("delay damages"), is due, when Pennsylvania rules of procedure deny such interest?

Parties to the Proceeding

The cross-petitioners are listed in the petition. (Pet. at ii).

The cross-respondents joining this brief are: Consol Pennsylvania Coal Company; Consolidation Coal Company; Consol Land Development Company; The Monongahela Railway Company; Greenon Coal Company; Rheinbraun A.G.; and Maria Theresia Bergbaugesellschaft mbH.

Other cross-respondents in the proceedings below were David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.; and William Reese.*

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* Pursuant to Rule 29.1, we advise the Court that the corporate respondents are owned as follows:

Greenon Coal Company is a subsidiary of Consol Energy, Inc. The latter is a subsidiary of Du Pont Energy Company, Rheinbraun A.G., and Rheinbraun U.S. GmbH.

Du Pont Energy Company is a subsidiary of E.I. Du Pont De Nemours and Company.

Rheinbraun A.G. and Rheinbraun U.S. GmbH are subsidiaries of RWE AG.

Consolidation Coal Company is a subsidiary of Consol Energy Inc. Consol Land Development Company was merged into Consolidation Coal Company in 1987.

Consol Pennsylvania Coal Company is a subsidiary of Consolidation Coal Company.

Maria Theresia Bergbaugesellschaft mbH is subsidiary of Rheinbraun AG.

The Monongahela Railway Company is a subsidiary of Consolidated Rail Corporation.

The Upshur Agency, Inc., does not have a parent corporation.

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STATEMENT OF THE CASE

Introduction

These cases turn on the *continuity* element of the RICO statute's prohibition of patterns of racketeering activity. 18 U.S.C. §1962(c) and (d) (1988 & Supp. 1989); *see H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (continuous misconduct necessary to establish RICO "pattern"). Contrary to findings of both courts below, cross-petitioners contend that the conduct of cross-respondents in question was continuous

in the sense of the RICO statute.[1] The RICO claims centered on representations made by respondents to induce sales of a linear series of parcels of land to assemble a railroad right-of-way near Waynesburg, Pennsylvania. As is shown below (*infra* at p. 7), two district judges found — and the Court of Appeals agreed — that contacts between petitioners and respondents lasted only for "a ten month period" (50a), and that respondents

> had but a single, discrete objective — namely, to purchase the right-of-way needed to build a rail line . . . The scheme was completed and came to an end once the necessary properties were acquired. (91a, 110a).

A subsidiary contention of petitioners is that their sales to a railroad were, in effect, "takings" for which "just compensation" is payable by respondents under the Fifth Amendment. The contention is frivolous and comes too late.

The petition should be denied because these issues were decided correctly below. Further, the continuity issue is fact-intensive and sui generis, without larger federal significance; the Court has denied the writ repeatedly in recent cases presenting the continuity issue (*infra* at p. 8, n.3).

The Facts

In stating the facts of these cases petitioners again indulge in the "rhetorical extravagance" for which they were faulted by the District Court. (87a, n.2). It is consequently necessary to restate facts that bring into focus the barren record upon which petitioners rely in contending that respondents' conduct possessed RICO continuity.

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[1] The Court is advised that the "petition" (hereinafter "Pet.") arises from the same Third Circuit judgment as the petition in No. 91-1324, filed February 14, 1992, and should have been denominated a "cross-petition". To avoid confusion, the usage of cross-petitioners is followed herein: cross-petitioners will be referred to as "petitioners" and cross-respondents will be referred to as "respondents". References to pages of the Appendix are in the form "(____a)."

The frame of reference within which the facts must be considered is *H.J. Inc.*, 492 U.S. 229 (1989). The Court there held that RICO continuity involved alternative tests: continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition". *Id.* at 241. As will be seen, respondents engaged in neither type of conduct.

In 1981, respondents Consolidation Coal Company ("Consol"), a coal producer based in Pittsburgh, Pennsylvania, and Rheinbraun A.G., a coal producer of Cologne, Germany, and affiliates (collectively, the "Consol Respondents"), formed a joint venture to develop coal reserves near Waynesburg, Pennsylvania. The mine was to be located near the junction of a railroad operated by the Monongahela Railway Company ("Monongahela"). Construction of a spur on a right-of-way running from the mine to the junction was necessary. As planned, the right-of-way traversed over 50 parcels of largely vacant rural and farm land, including properties of petitioners.

Respondent Upshur Agency, Inc. ("Upshur"), a real estate agency, was retained to negotiate with petitioners (and other owners) for the acquisition by the Monongahela of necessary parcels. Negotiations with petitioners started in September, 1981, (50a), when Upshur began to acquire options to purchase a number of the properties along the right-of-way. By June, 1982, ten months later, all necessary properties were acquired by purchase from petitioners and others. (50a). Contrary to repeated assertions by petitioners (Pet. 4, 5, 7, 8, 24), there was not any evidence that a second right-of-way was being sought by respondents. (90a) (*infra* at p. 7).

In early 1983, petitioners filed eight actions in the United States District Court for the Western District of Pennsylvania against the Consol Respondents, the Monongahela, and others. Petitioners alleged fraud and conspiracy under the RICO statute, 18 U.S.C. §§1961-68 (1988 & Supp. 1989), and at common law, perpetrated by respondents during negotiations for the purchase of their parcels. The frauds alleged included false statements

that the Monongahela had powers of eminent domain, that only the Monongahela, and not Consol, was involved in the purchases, and that part of the purchase price would be tax-free to some petitioners. Petitioners demanded compensatory and punitive damages.

The First Trial

The cases were consolidated and tried to a jury in early 1987. Judge Hubert I. Teitelbaum presided.

Before the trial, on respondents' motions for partial summary judgment, Judge Teitelbaum held that Upshur's representations that the Monongahela had condemnation powers were true, a holding duly affirmed by the Third Circuit. (51a-56a).

On the remaining claims the jury found most of respondents liable as alleged. It valued petitioners' properties, in the aggregate, at $5,360,500 more than the prices paid; that amount was awarded as compensatory damages and trebled under RICO. The jury also awarded punitive damages in the aggregate amount of $5,500,000 against specific respondents. (43a).

But on respondents' post-trial motions the judge, on October 22, 1987, granted judgment n.o.v. to all respondents on the RICO claims, holding that there was not any evidence of ongoing misconduct by respondents beyond the short period of contact between the parties, which had "a discrete temporal ending point". (110a). With respect to surviving claims of common law fraud, the judge set aside the resulting award as "obscenely excessive" (105a, 112a) and ordered a new trial on damages only.

Thereafter, the Third Circuit decided an unrelated case on grounds that appeared — mistakenly, as events proved — to undermine Judge Teitelbaum's analysis. *Bartichek v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987). On petitioners' motion for reconsideration, therefore, Judge Teitelbaum reinstated their RICO claims. (94a).

The cases were now assigned to Judge D. Brooks Smith. In light of the Court's decision in *H.J. Inc.*, 492 U.S. 229 (1989),

which defined the continuity requirement in terms that excluded respondents' conduct, Judge Smith again dismissed petitioners' RICO claims. (80a). In answer to petitioners' contention — repeatedly and falsely advanced here (Pet. 4, 5, 7, 8, 24) — that there was evidence adduced to the first jury that respondents' conduct threatened to continue by the assembly of a *second* right-of-way, Judge Smith searched the record of the first trial and concluded that "the jury was not presented any evidence that any additional right-of-way would be required by the defendants [respondents] after the spur in question was completed." (90a).

The Second Trial

On March 6, 1990, a second jury trial, limited to damages recoverable for common law fraud, commenced before Judge Smith. On April 6, 1990, the second jury awarded compensatory damages of $4,262,677 and punitive damages of only $674,000.

Respondents' post-trial motions for judgment n.o.v. and for a new trial were denied by Judge Smith.

Proceedings in the Third Circuit

Petitioners and respondents appealed to the Third Circuit. Petitioners sought (among other matters) the reinstatement of their RICO claims and an award of "delay damages" (i.e., interest from the date of the filing of the complaints) under Rule 238 of the Pennsylvania Rules of Civil Procedure; the Rule authorizes such damages only in cases of "bodily injury, death, or property damage".

The Court of Appeals affirmed the dismissal of petitioners' RICO claims and the denial to petitioners of delay damages. In respect of the common law claims, however, the Third Circuit vacated the second jury's award in its entirety and reinstated the first award of compensatory and punitive damages. *Hughes v. Consol Pennsylvania Coal Co.*, No. 90-3466 (3d Cir. Dec. 20, 1991) (amended opinion) (1a).

REASON FOR DENYING THE WRIT

Summary of Argument

Scrutiny of the record of the first trial by five judges (two in the District, three in the Circuit) resulted in their holdings that there was not any evidence from which a jury could find continuous RICO misconduct by respondents. Moreover, the fact-intensity of the continuity issue precludes useful review by this Court, and the writ should be denied in accordance with the Court's recent practice of declining review of that issue.

The contention that petitioners are entitled to delay damages by way of "just compensation" for a "taking" under the Fifth Amendment is frivolous and comes too late.

I.

THERE WAS NOT ANY EVIDENCE OF "CONTINUOUS" CONDUCT, PAST OR THREATENED, BY RESPONDENTS.

The Court of Appeals, in reviewing the evidence bearing on the continuity issue, construed "the evidence in a light most favorable to petitioners and search[ed] the record for the minimum quantum of evidence to support the [first] jury verdict." Affirming the District Court, the Third Circuit concluded: "Here we cannot find the minimum quantum of evidence to support continuity." (45a).

First, as to closed-ended conduct, the search of the record by the appeals court confirmed the findings of District Judge Teitelbaum (after the first trial) and District Judge Smith (before the second):

> Reviewing the record Judge Teitelbaum made the correct factual finding: Defendants' [respondents'] scheme "lasted from July 1981 until sometime in early-1982." [citation]. More precisely, Judge Smith found the scheme lasted from June 1981 to June 1982. [citation]. *In fact plaintiffs testified that contacts with*

> *Upshur agents — the source of these actions — started about September 1981 and ended in June 1982, a ten month period.* (49a-50a) (emphasis supplied).

The Court of Appeals concluded that,

> [a]ll the evidence points to a short term operation. . . . [*There was] no intent to acquire more land than originally contemplated*. . . .When the defendants [respondents] acquired all the property in the areas of interest, the fraud was complete. In short, defendants worked a single-scheme, single-victim (albeit a class of victims) operation that lasted one year at most. (50a) (emphasis supplied).

On this evidence, a jury finding of closed-ended conduct was precluded.

As for "open-ended" conduct, both district judges and the Court of Appeals agreed there was none that a jury could find. In answer to petitioners' contention that respondents intended to acquire not only the right-of-way running to the first mine, but a second right-of-way thereafter — a contention unsuccessfully advanced in the Court of Appeals and incautiously here (*Pet.* at 4, 5, 7, 8, 24) — Judge Smith held:

> Contrary to plaintiffs' argument, however, *the* [first] *jury was not presented any evidence* that any additional right-of-way would be required by the defendants after the spur in question was completed. (90a) (emphasis supplied).

Judge Smith agreed with (and quoted) Judge Teitelbaum's original view that "defendants had but a single, discrete objective - namely, to purchase the right-of-way needed to build a rail line. . . .*The scheme was completed and came to an end once the necessary properties were acquired.*" (91a, 110a). The Court of Appeals affirmed:

> There were no "potential" areas of interest. Once defendants obtained the property, they posed no future threat to plaintiffs or society. (49a).
>
> [There was] no intent to acquire more land than originally contemplated. (50a).

This review of the record by five judges demonstrates that there was neither closed-ended nor open-ended conduct; hence, there was no continuity, no "pattern", and no violation of RICO. These issues were correctly decided below.[2]

Further, the Court has recognized the fact-intensity of the continuity issue; that the dual standard of continuity must be applied to multifarious facts. *See H.J. Inc.*, 492 U.S. at 242 (continued racketeering activity "depends on the specific facts of each case"). Petitioners do not question the Court's formulation of the continuity standard, seeking, merely, review of the application of the standard to the peculiar facts of these cases. The Court has repeatedly declined to grant the writ for the purpose of reviewing whether the facts establish continuity (or other elements of a "pattern of racketeering activity").[3]

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[2] Petitioners make much of exhibits (Pet. at 4, 8, 24) that, they claim, show that respondents planned to build "a second 6-mile track line" to another coal reserve. (*Id.* at 24). The exhibits, which are not annexed to the petition, show no more than that respondents conceived of the possibility that at some remote future, undefined date respondents might begin to extend the right-of-way purchased from petitioners and others. The exhibits were considered by the courts below and dismissed as non-probative. (49a-50a, 90a).

[3] *See, e.g., United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, 111 S.Ct. 2826 (1991); *Kehr Packages, Inc. v. Fidelcor. Inc.*, 926 F.2d 1406, 1417 (3d Cir.), *cert. denied*, 111 S.Ct. 2839 (1991); *Landry v. Air Line Pilots Assn. Intl.*, 901 F.2d 404, 432-33 (5th Cir.), *cert. denied*, 111 S.Ct. 244 (1990); *United States v. O'Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 953 (1991); *Lane v. Peterson*, 899 F.2d 737, 744-45 (8th Cir.), *cert. denied*, 111 S.Ct. 74 (1990); *United States v. Link*, 921 F.2d 1523, 1527 (11th Cir.), *cert. denied*, 111 S.Ct. 2273 (1991); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117-20 (D.C. Cir.), *cert. denied*, 112 S.Ct. 85 (1991).

In a misconceived effort to create a reviewable issue, petitioners argue that post-*H.J., Inc.* cases in the circuit courts have mistakenly adopted "rigid time limits" in determining the continuity element of RICO's "pattern" requirement (Pet. 17-18). To bolster this argument, petitioners cite three *district* court cases, none of which establishes "rigid time limits."[4] Indeed, a review of circuit court cases decided since *H.J., Inc.* confirms that the courts have adhered to this Court's holding that the continuity issue is fact-specific and therefore cannot be governed by "rigid time limits."[5]

Finally, petitioners, agreeing that the continuity issue is fact-intensive, argue from that proposition that the issue is exclusively a jury matter. (Pet. 20-21). There is no authority for so radical a view. Motions for judgment n.o.v. (and for a directed verdict) are part and parcel of the jury system, whether in RICO or other cases at law. Fed. R. Civ. P. 50.

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[4] The courts in the cases cited by petitioners each acknowledged that this Court in *H.J., Inc.* required the application of a flexible, fact-specific approach. *See United States v. Busacca*, 739 F. Supp. 370, 377 (N.D. Ohio 1990) ("The determination of whether the predicate acts show sufficient continuity is fact specific. Prior case law provides guidance, but no clear bright line test."); *Dynabest v. Yao*, 760 F. Supp. 704, 710 (N.D. Ill. 1991) (court indicates that *H.J., Inc.* requires application of a "flexible approach."); *Chase Manhattan Bank v. Malatesta*, 1990 U.S. Dist. Lexis 9222 (S.D.N.Y. 1990) (In *H.J., Inc.*, "the [Supreme] Court rejected the rigid test applied by the Eighth Circuit.")

[5] *See, Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 45-46 (1st Cir. 1991); *United States v. Coiro*, 922 F.2d 1008, 1016-17 (2d Cir.) *cert. denied*, 111 S. Ct. 2826 (1991); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1412 (3rd Cir.), *cert. denied*, 111 S. Ct. 2839 (1991); *Parcoil Corp. v. Nowsco Well Service, Ltd.*, 887 F.2d 502, 503-04 (4th Cir. 1989); *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461-62 (5th Cir. 1991); *Thompson v. Paasche*, 950 F.2d 306, 310-11 (6th Cir. 1991); *Olive Can Co. v. Martin*, 906 F.2d 1147, 1150-51 (7th Cir. 1990); *Lange v. Hocker*, 940 F.2d 359, 361 (8th Cir. 1991); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990); *United States v. Hobson*, 893 F.2d 1267, 1268-69 (11th Cir.), *cert. denied*, 111 S. Ct. 384 (1990); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117-20 (D.C. Cir.), *cert. denied*, 112 S. Ct. 85 (1991).

II

PETITIONERS WERE NOT ENTITLED TO DELAY DAMAGES UNDER PENNSYLVANIA LAW, AND THE CONSTITUTIONAL CLAIM FOR "JUST COMPENSATION" IS FRIVOLOUS AND WAS WAIVED.

Petitioners contend that they were entitled to what Pennsylvania law terms "delay damages" in addition to the compensatory damages awarded by the first jury. Under Rule 238 of the Pennsylvania Rules of Civil Procedure, interest is awarded from the date of the complaint on compensatory damage awards arising from "bodily injury, death or property damage." (62a). As petitioners' damages did not so arise but arose "from fraud in the making of contracts", Judge Smith held that Rule 238 did not apply, disagreeing with Judge Teitelbaum on the point. (76a). The Court of Appeals agreed with Judge Smith and dismissed petitioners' contention peremptorily. (62a).

Petitioners go on to argue that the denial of delay damages was an unconstitutional denial of just compensation under the Fifth Amendment "since it denies a property owner interest on property acquired pursuant to a condemnation scheme. . . ." (Pet. at 15).[6]

As a procedural matter, the argument was not advanced in either court below and surely is excluded from consideration here. *See Air Courier Conf. of America v. America Postal Workers Union, AFL-CIO*, 111 S.Ct. 913, 917 (1991) (Rehnquist Ch.J.) (contention not advanced in either lower court not reviewable); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 277 (1989) (same).

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[6] Petitioners undoubtedly mean to refer to the Fourteenth Amendment; the Monongahela is not a federal entity.

As a substantive constitutional matter the frivolity of the argument is plain. The issue is simply one of Pennsylvania law. It cannot be puffed up into a constitutional matter as a "taking" of private property for public use without just compensation. (Pet. at 15). For if there is any fact that is beyond debate it is that petitioners' lands were not "taken" under eminent domain procedures but were purchased for an agreed price under negotiated contracts of sale and deeds of conveyance. The complaints alleged fraudulently induced *sales* of property. (85a). The courts below found that the transactions between petitioners and respondents were "negotiated"; petitioners "sold" their parcels to the Monongahela. (42a). The negotiations were sometimes heated (Pet. at 11) but they were negotiations nevertheless, leading to contracts of sale, not condemnations. Petitioners concede as much: "despite so many representations about the eminent domain power, *no land was ever condemned*". (Pet. at 12) (italics in original). That concession removes from consideration petitioners' reliance on *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1924) (*Pet.* at 15, 18), an authentic case of condemnation by the United States.

To be sure, petitioners sold their properties to the Monongahela, which, the courts below held, had condemnation powers. (51a-56a). Such sales to railroads and other authorities with the power of eminent domain are commonplace. "Most - perhaps ninety-eight percent - of the land acquired by eminent domain is obtained without litigation, by private negotiation; hence, without constitutional disputes." G. Lefcoe, *Land Development Law* 108 (1966). A *sale* to a governmental authority is consequently deemed an ordinary commercial transaction, not a transaction in which the sovereign acts as such. "The constitutional provision which prohibits taking of property for public use without compensation . . . has no application to the decision of a court upon the relative rights in property of parties litigant which have been *voluntarily created by contract* . . . ." 2 *Nichols on the Law of Eminent Domain* §6.01 (J. Sackman ed. 1989) (emphasis supplied); *see Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) (denial by Department of Interior to

lessee of license to drill under oil and gas lease granted by Department is ordinary breach, not "taking" by sovereign). Indeed, a condemnor's assertion that it will use its powers of condemnation if a contract of sale cannot be negotiated does not affect the validity of the contract. *See Goodpasture v. Tennessee Valley Authority*, 434 F.2d 760, 763-64 (6th Cir. 1970) (statement by T.V.A. that it will condemn if sale not negotiated, not duress).

By the same token the contracts under which the Monongahela purchased petitioners' lands, and the circumstances surrounding the contracts, involved non-governmental activity to which the Fifth and Fourteenth Amendments do not apply.

CONCLUSION

The petition should be denied. The decision below was correct: the first jury could not properly have found respondents guilty of continuous acts of RICO misconduct; the courts below rightly denied "delay damages" to petitioners; and the "just compensation" claim is frivolous and was waived. Further, the petition concerns a peculiar constellation of facts that does not present any issue of general federal importance.

Respectfully submitted,

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